COLUMBIA
LAW REVIEW.

Vol. XV. APRIL, 1915. No. 4

POLITICAL SAFEGUARDS AND JUDICIAL GUARANTIES.

Government still exists primarily for the protection of certain interests of those who are governed. The character of the rights to be protected changes with the social and industrial organization, and rights which under one condition deserve protection, under another must properly give way to the interests of the community at large. In no country has there ever been drawn a hard and fast line separating rights properly individual from matters subject to governmental regulation, and so long as society is dynamic no such line can be drawn. Yet at any one time certain rights may properly be recognized as requiring protection, and with a society as we now know it, the institution of private property and certain individual actions (as freedom of speech, of the press, etc.) may be regarded as such rights. Whether we agree or not as to its precise limits, there should be a sphere of individual action free from governmental control. But the limits of such a sphere are changing and the safeguarding of the interests which now demand protection must not unduly block readjustments rendered necessary by new social and industrial conditions. This is, in effect, the problem presented in connection with the safeguarding of individual rights. Were the same rights at all times specific, permanent and clearly definable, their protection would not be difficult, and their delimitation once for all as free from governmental action would not be improper.

This discussion deals with the safeguarding of individual rights or interests, and it must be borne in mind that each new generation of a growing society re-defines in terms of its own need the limits between individual right and governmental regulation. In the

discussion of individual rights it should also be remembered that what the advocates of individual safeguards ordinarily have in mind is a safeguard of property rather than of personal rights.

Before discussing types of safeguards it will be worth while to consider just what we may mean by constitutional or other safeguards of individual rights. As to this matter there are two distinct points of view. One group of writers claims that the safeguard must be against democracy itself. This view is represented among English authors by Mr. W. S. McKechnie.[1] Mr. McKechnie's argument as to England runs somewhat as follows: The political dominance has passed to the non-property owning classes, who are primarily interested in increased governmental expense, such as that with reference to old age pensions, unemployment insurance, etc. These classes, not paying taxes, but receiving the benefits of taxation, will if in complete control operate the government in their own interests, and in the long run cripple or destroy the propertied classes—the more provident classes of the community. A safeguard of some sort is therefore desirable to protect property from a democratic government. This view is not always on the surface in England and the United States, but is implicit in much of the discussion of the subject.

The argument for safeguards against democracy has some basis. The electorate is primarily interested in tax spending and the interests of the majority are to some extent opposed to the interests of the property-owning classes. So long as governmental issues are political, the members of a minority have the possibility of becoming part of a later majority. But when the issues are industrial, the property-owning classes may become a permanent minority whose interests are not adequately protected by purely political means. And yet such interests in the last resort must depend for protection, not upon artificial barriers which the people themselves may remove, even though with difficulty, but upon the sentiment of those who control the governmental organization.

Another view, more often expressed, is the view that safeguards are necessary to make sure that what is claimed to be popular opinion actually is so. Professor A. V. Dicey represents this view. He says: "A constitutional safeguard means under any form of popular and parliamentary government (such as exists,

[1]The New Democracy and the Constitution (London, John Murray, 1912).

e. g. in England, in the United States, or in France), any law or received custom, which secures that no change in the constitution or the fundamental laws of the country shall take place until it has obtained the permanent assent of the nation."[2]

The two points of view may be simply illustrated: The Prussian three-class system of voting, which gives a predominant influence to the highest taxpayers, may easily be classed as a safeguard against democracy. The theory, still held if not fully effective in England, that no question of fundamental importance shall be determined by Parliament except after a general election in which the matter has been approved by the country, is a safeguard of democracy, not a safeguard against democracy. In this discussion primary attention will be directed to the safeguards which are compatible with the notion of democratic government. The whole tendency has been toward a democratic control, and such a control is in modern governments more, rather than less necessary, when government because of increasing activity is becoming more of an economic or social problem rather than a purely political one. Any limitation which, once imposed, is practically impossible or very difficult to remove, is in fact a limitation against democracy. A safeguard of individual right under a democratic government is one which assures that action, when taken, represents a real popular view—the sober and considered sentiment of the community.

Safeguards of individual right may, for our purposes, be divided into two classes: (1) safeguards or guaranties, whether in a constitution or not, which are not judically enforcible; (2) safeguards or guaranties which are judicially enforcible. Those of the first class may for the purposes of our discussion be called political guaranties, and those of the second class judicial guaranties. A distinction is sometimes made between political guaranties on the one side and constitutional guaranties on the other; but many constitutional guaranties are not judicially enforcible, and the problem of greatest interest is that of guaranties or safeguards not judicially enforcible as against guaranties or safeguards that are judicially enforcible. Using the terms as just defined we may well consider somewhat in detail the two types of safeguards.

[2]Rights of Citizenship, with preface by the Marquess of Lansdowne (London, Warne, 1912) p. 81. A similar view is represented by Mr. A. M. Kales' Unpopular Government in the United States, pp. 193-224.

1. *Political safeguards.*

The political safeguards, or safeguards of which judicial enforcibility does not constitute an essential element, may for convenience be grouped under the following heads:

(1) Suffrage limitations, whether embodied in constitutions or laws. The more limited the suffrage the greater the influence of propertied classes in the result of elections. Somewhat similar to a limited suffrage is the effect of an apportionment of representatives in such a manner as to give greater weight to certain elements in the community.

(2) An upper house based largely on property, hereditary, or upper class interests. Of course the influence of such a house varies with its actual political power, being very great for the German *Bundesrat* and relatively much less important for the British House of Lords since the Parliament Act of 1911.

(3) Checks and balances of government, such as an arrangement that each law shall have obtained the approval of two houses and of the executive. Such machinery constitutes a safeguard upon governmental action, even though the members of both houses and the executive be chosen by the same (and by a democratic) electorate. Of this type of safeguard the governments in the United States furnish perhaps the best example.

(4) Under a government with a legislature elected on a popular basis, the referendum constitutes in the long run a definite check upon the legislature, and one which is likely in many cases to operate in a conservative sense.

(5) A safeguard of a purely political type presents itself in the character of the people themselves. England with a democratic suffrage still keeps the actual conduct of its government in the hands of the aristocratic classes. In France the large number of small property owners leads to a conservatism which is the most effective safeguard of property interests. With respect to this matter there is variation due to social and political organization. "Political power is vested in the mass of citizens; but the mass of citizens, in most countries, are too busy or too indifferent to obtain political knowledge. Hence it arises that their public affairs are still managed for them, and the direction of their public policy really determined by an oligarchy of one kind or another. In

some states, with a wide popular franchise, but an imperfectly developed constitutional system, as in Austria and Germany, it takes the form of a ministry and a civil service under the control of a strong personal monarchy. In the Latin countries it is usually seen in the shape of a powerful, all-pervading bureaucracy. The modern English substitute is found in groups of persons who pay rather more continuous attention to public affairs than the majority of the electors." In England these persons come primarily from the leisure classes. A governing group has usually as large a share in moulding the spirit of a government as has a democratic electorate, although the electorate which has final power may in the long run be expected to assume an increasingly important share in the actual operation of government. In some countries property interests through pecuniary methods maintain a large political control, but such a safeguard of property is one which must in the long run prove ineffective.

(6) A check of some effectiveness is that which comes from guaranties in a written constitution, even though such guaranties are not judicially enforcible. A constitution may be and usually is regarded as of superior authority, even though not judicially enforcible, and this is especially true where the method of constitutional change is more difficult than that of ordinary legislation. So, for example, in Belgium, the non-judicially enforcible constitutional guaranties seem to have something of effectiveness.

(7) Although no effective means has yet been devised for the purpose, constitutional guaranties may be enforcible to some extent by other than the judicial authority. The Council of Censors in Pennsylvania and Vermont and the *Sénat Conservateur* of the French constitutions of 1799 and 1852 proved ineffective, but the Councils of Revision in New York (1777-1821) and Illinois (1818-1848) proved of some effect in enforcing constitutional limitations.

The so-called right of revolution or abstract right to disobey the law cannot be called safeguards of an important character, but it is of importance to bear in mind that safeguards of property or individual right need not necessarily depend upon the distinction between constitution and statute, and need still less to depend upon a judicial enforcement of such a distinction. Nor need such a safeguard have a legal basis in order to be effective. The safe-

guards referred to above as political (*i. e.* not judicially enforcible) fall really into three classes, (a) the purely political, (b) those having a legal basis, and (c) those having a constitutional basis; and for some countries to-day the purely political safeguards are the most effective.

It may be well to discuss briefly the political safeguards in Great Britain. This subject has been vigorously agitated during the past few years in England in connection with the passage of the Parliament Act of 1911. Before 1911 the House of Lords possessed the power to force a popular election upon any important measure (not financial) as to which the popular will had not been expressed in a general election, and it actually exercised this power as against measures proposed by the Liberals, the party most apt perhaps to bring forward legislation of a radical character. The supporters of the House of Lords did not claim and had not for a long period claimed power to defeat legislation which had been approved by the people, but they did claim power "to reject any bill of first rate importance which the House [of Lords] reasonably and *bona fide* believed to be opposed to the permanent will of the country."[3] The function of the House of Lords, so conceived, was that of forcing an appeal to the people, and advocates of the House of Lords pointed with assurance to the fact that the Lords' rejection of Irish Home Rule in 1893 was decisively supported in the general election of 1895; this case, in the language of Professor Dicey, "means that at a great crisis in the fortunes of England, the hereditary House of Lords represented, whilst the elected House of Commons misrepresented, the will of the people."

Under the Parliament Act of 1911, the control of the Lords over money bills is specifically denied, and as to other bills the Lords' opposition may be overcome if a bill is passed by the Commons in three successive sessions provided "two years have elapsed between the date of the second reading in the first of those sessions of the bill in the House of Commons and the date on which it passes the House of Commons in the third of those sessions." The Lords thus have a suspensive veto for two years. The Commons are now elected for five years, and are not apt to be dissolved before the expiration of that period, and although elected upon one issue may, during the first three years, bring forward important measures not made an issue in the general election, and push these measures through before the next general election. It is this

[3]Dicey, Rights of Citizenship, 85.

situation which causes Mr. McKechnie and Mr. Dicey to say that England is subject to the uncontrolled dominance of a popular chamber and that constitutional safeguards in England have been destroyed. The Conservatives urge the organization of a strong upper house with greater power as a remedy for this situation, and also the referendum. The preamble to the Parliament Act of 1911 promises to "substitute for the House of Lords as it at present exists a second chamber constituted on a popular instead of hereditary basis," but this promise is not likely to be carried out by a Liberal government. A more powerful second chamber, representing property or aristocratic interests, which could delay or defeat the measures of the Commons, would be a more effective safeguard than the present House of Lords, although such a house if organized would in the end have to give way before a definite expression of popular will represented by the election of a majority to the House of Commons. It is true that no machinery exists in England since 1911 by which in each case a popular judgment may be insisted upon before the enactment of an important measure. It is for this reason that the referendum is urged—the plan of submitting to the people the specific question, divorced from the complicating issues that present themselves in a general election. A greater popular participation is thus regarded as an additional safeguard and would actually be so.

As a matter of fact, the House of Lords as a conservative influence is perhaps not so powerless since 1911 as many English authors would, in their political arguments, have us believe.[4] The Lords may delay a measure for two years, and if the measure is presented within the last two years of the terms of members of the House of Commons, the Lords may prevent its passage until after the next general election. Within the first three years of their term, however, the Commons are legally limited only by the provision for a two-year delay, and during this period the English government approaches that of a single chambered body with legally unlimited powers. Yet, politically, the influence of the House of Lords is apt still to remain somewhat large.[5]

The most important safeguards in England to-day are the purely political as opposed to the legal. In the first place, no House of Commons, even though legally unlimited during its first

[4] See Lowell, Government of England (New Edition) Vol. I, 433-436.

[5] See remarks in Sidney Low's Governance of England (New Edition, 1914) xiv.

three years of service, is likely to pass measures which it thinks will meet with the distinct disapproval of the people at the next general election. The general election each five years serves as a general referendum and will keep a popular chamber from getting very far beyond what the people will approve, although of course there is no sufficient check upon specific measures; this safeguard is weakened though not destroyed by the more effective party discipline of the present day and the tendency toward coalition ministries, in which each group will insist upon the passage of its measure in return for its support.

Mr. Sidney Low, in dealing with this question, has said recently: "But under a single-chamber system, it may be said, the check which an upper house exercises upon the abuse of its position by a cabinet would cease to operate. It does not operate very effectively at present and it is likely to grow weaker. The real restraint upon the majority in the Commons is the existence of the Opposition in the House and the Constituencies, and the knowledge that the sovereign electorate can and will call the alternative government into office if it is dissatisfied with the conduct of the group it has placed in power. The abolition of the second chamber is not likely to be seriously contemplated. But if it were accomplished it would be a far less revolutionary change in the substance, if not the form, of our system than is commonly supposed." Mr. Low does, however, favor the referendum as a means of expressing the popular will, when ministers are unwilling to submit to a general election. This is perhaps to say that the present organization in England is not sufficiently democratic, and should have imposed upon it the check of more democracy.

Most effective, however, is the safeguard resulting from the fact that while the electorate is democratic, the actual conduct of government is in the hands of the upper classes. So true is this that a brilliant little book in 1911 charged that the whole party system in England is a pious fraud maintained by secret alliance among political leaders (aristocratic and plutocratic) for the purpose of deceiving the people, and governing in their own interests. A quotation will make this view clear: "We have to-day to deal not with a divided but with a united plutocracy, a homogeneous mass of the rich, commercial and territorial, into whose hands practically all power, political as well as economic has now passed. . . . It [power] has passed to a political committee

for which no official name exists (for it works in secret), but which may be roughly called 'The Front Benches'. This committee is not elected by vote, or by acclamation, or even by general consent. Its members do not owe their position either to the will of the House or the will of the people. It is selected —mainly from among the rich politicians and their dependents —by a process of sheer and unchecked co-optation. It forms, in reality a single body, and acts, when its interests or its powers are at stake, as one man. No difference of economic interest or of political principle any longer exists among its members to form the basis of a rational line of party division. Nevertheless, the party division continues. The governing group is divided arbitrarily into two teams, each of which is, by mutual understanding, entitled to its turn of office and emolument. And a number of unreal issues, defined neither by the people nor by the Parliament, but by the politicians themselves, are raised from time to time in order to give a semblance of reality to their empty competition. That is the Party System as it exists to-day, and by it the House of Commons has been rendered null, and the people impotent and without a voice."[6] This was published at a time when England was echoing with the cry that all political and constitutional safeguards were being destroyed. The view expressed above has some apparent basis. Let us turn to less exaggerated statements.

Writing in 1904 Mr. Sidney Low said that the English workingman has remained "generally faithful to the tradition, which has prevailed through all English history, that the conduct of public affairs should be largely entrusted to those who enjoy the advantages of birth, breeding, and affluence."[7] More recently President Lowell has said: "The fact is that the upper classes in England rule to-day, not by means of political privileges which they retain, but by the sufferance of the great mass of the people, and as trustees for its benefit. Their leadership is highly popular with the masses, but it depends upon keeping the respect of the nation by a generally unstained reputation for probity of character; for if that reputation were seriously impaired the ruling class would soon be swept from power. . . . Moreover, most of the men who play the leading parts in the game of politics, as trustees for the people under the public eye, have fought together

[6]Belloc & Chesterton, The Party System (1911) 29, 33-34.

[7]Low, Governance of England (New Edition, 1914) 174, 176, 190.

in the sports of schools and colleges, and are constantly meeting in the society of London. This in itself tends to make them play the game fairly, and observe the conventional rules of honor of the day."[8] Mr. Low, writing again in 1913, says that the democratic element in Parliament has increased, but feels that conditions have not altered to a great degree. He says: "A parliament in King George V's reign includes a larger body of persons of moderate means, persons who have had to earn their livings by their own exertions, than any parliament in the reign of Queen Victoria. But the socio-political class, and the descendants of the 'governing families' are still well represented, and if the aristocratic element is declining the plutocratic is growing stronger."

It may properly be said that in England to-day there are no purely legal safeguards upon government, but there is the important safeguard of a purely political character, in that the government is operated by an upper class group, while controlled by a democratic electorate. The non-judicially enforcible safeguards in England are certainly less than those in this country and it is worth noting that the United States has been referred to in much of the British discussion as *par excellence* the country of constitutional safeguards, and this without reference to the additional fact that in this country there are judicially enforcible guaranties of individual rights. It is an interesting fact that in the British discussion of safeguards in the United States primary attention has been paid to checks and balances in governmental organization, and little to the judicial power to enforce constitutional guaranties.

Before taking up the subject of judicially enforcible guaranties, emphasis should be placed upon the fact that judicially enforcible guaranties, in all countries where they are found, exist in connection with and in addition to guaranties or safeguards which are political or not judicially enforcible. As has already been suggested the system of judicial guaranties in the United States supplements an elaborate body of political safeguards as well. If an issue is raised as to types of guaranties under present conditions, the question would largely be one as to mere political guaranties on one side, as opposed to political plus judicial guaranties on the other.

[8]Lowell, Government of England (New Edition) Vol. 2, 508.

2. *Judicial Guaranties.*

The doctrine that courts shall enforce constitutional limitations against the legislature has now a wider acceptance than is generally appreciated. In Australia, Argentina, Greece, Norway, and Roumania, the courts enforce constitutional limitations in much the same manner as they do in the United States, although cases arise much less frequently than they do with us. In Switzerland the federal court enforces against cantonal legislation the guaranties in both cantonal and federal constitutions. For Canada a judicial control exists in order to keep the provincial and dominion legislatures within the limits of the British North America Act.[9] The constitutions of Portugal, Nicaragua, Honduras, Cuba, Haiti, and Venezuela expressly grant to the courts power to disregard laws conflicting with the constitutions, and in several other Latin-American constitutions there are provisions which imply a similar power. Too much reliance, however, must not be placed upon the declarations in some of these constitutions. In Haiti, where power is conferred upon the courts in most positive terms, it has never been exercised and its existence as a reality is denied by a recent author.[10] To complete the list, it may be added that in Liberia the courts exercise such a power,[11] and that a judicial power over legislation was asserted in the Transvaal in 1896.[12]

The question of judicial control over legislation has been discussed in a number of the European countries, more especially in Belgium, Germany, and France; and French jurists, while denying the present existence of such a power in France, are overwhelmingly in favor of the adoption of the principle of judicial control.[13] In fact one of the ablest of French jurists has recently

[9]In a number of federal governments (Brazil, Mexico, Switzerland, Germany) there exists impliedly or expressly a judicial power to disregard state laws which conflict with the federal constitution or laws, but this may be regarded more appropriately as a control of superior over inferior legislation, rather than a true judicial control over legislation. Canada belongs to this class also, and in part Australia and the United States.

[10]Joseph Justin, *De L'Organization Judiciaire en Haiti* (Havre, 1910) 115-120.

[11]1 Liberia Supreme Court Reports, 243.

[12]Brown *v.* Leyds, 4 Kotze's Reports, High Court South African Republic, 17. Cape Law Journal, Vol. 14, pp. 71, 94, 109. J. W. Gordon in 14 Law Quarterly Rev. 343.

[13]Duguit, *Transformations du Droit Public* (1913) 91-103. See also Larnaude, *Bulletin de la Société de Législation Comparée,* Vol. 31 (1901-2) 175-229, 240-257.

argued that a judicial power to declare laws invalid exists as a matter of course, in the absence of express constitutional declaration to the contrary.[14]

But the issue under discussion in this paper is not the broad one of judicial power to declare laws unconstitutional, but the narrower one as to the use of such a power to enforce constitutional guaranties of individual rights and of property. A judicial power over legislation is of no great value for the purposes here under discussion unless linked with (1) guaranties of individual rights, and (2) a system which makes constitutional change relatively more difficult than the process of ordinary legislation. Canada and Australia have no broad constitutional guaranties. In Norway, Greece, and Roumania the cases in which constitutional guaranties have been judicially enforced against legislative action, though important, appear to be relatively few. A somewhat similar statement may be made with respect to Argentina. In Switzerland the judicial enforcement, against cantonal legislation, of constitutional guaranties in both cantonal and federal constitutions, is an active and effective force. The United States, however, and primarily the state courts in the United States, present the longest experience with a judicial enforcement of constitutional guaranties, and the judicial safeguard can be most satisfactorily discussed upon the basis of experience in this country. For this reason decisions from other countries will be cited in this paper only so far as they illustrate problems which have also presented themselves in the United States.

In the application of judicial power over legislation, constitutional limitations may be said to fall into three classes:

(1) Constitutional provisions which prescribe a clear and definite rule, capable of application by a court without any great discretion as to the interpretation or extent of the limitation. Few limitations fall within this class, and these relate largely to the form of legislative action or to specific prohibitions upon certain kinds of legislation. Such for example are constitutional requirements that a bill shall be read three times in each house[15] and that the readings shall be entered upon the journals. Yet some formal requirements are sufficiently indefinite to leave a large discretion in the court. Such a provision, for example, is that of

[14]Gaston Jèze, *Revue du Droit Public et de la Science Politique,* Vol. 29 (1912) 138.

[15]The requirement of three readings has become a mere empty form.

Illinois, which requires that no law shall be revived or amended by reference to its title only, but the law revived or the section amended shall be inserted at length in the new act.[16] Types of prohibitions upon specific kinds of legislation are those prohibiting special laws granting divorces, changing the law of descent, and remitting fines, etc.

(2) Limitations not so definite, but which yet provide something of a legal rule to guide the court. In this class come the provision in the constitution of the United States that no State shall pass any law impairing the obligation of contracts, and the provisions in state and federal constitutions that accused persons shall be entitled to trial by jury. Here terms are used which have a fairly definite meaning in a legal system, and the court in applying the limitations is guided by language which states a legal principle.

(3) Within the third class fall constitutional limitations of an indefinite character as that "no person shall be deprived of life, liberty, or property without due process of law," or that "no person shall be denied the equal protection of the laws," or that "private property is inviolate."

Constitutional guaranties of personal or property rights fall within the second or third classes, and there is no tendency to establish definite standards under such limitations. In fact there has been some tendency by judicial action to transfer provisions from the second to the third class. A prohibition of cruel and unusual punishments was once supposed to forbid punishments cruel in form, but has to a large extent been transferred by the courts into a prohibition of punishments which in the opinion of the court are disproportionate to the offense. The "due process of law" clause is the most striking illustration of this development. Once this limitation merely required procedure which would safeguard individual rights. Now it requires in addition legislation which in substance is such as the courts consider not unreasonable. The interests seeking protection naturally desire that protecting clauses be interpreted as broadly as possible, and in the long run they succeed in having their way.

But when decisions are based upon broad constitutional guaranties, interpreted as "due process of law" is now interpreted

[16]Ernst Freund, Supplemental Acts—A Chapter in Constitutional Construction, 8 Illinois Law Rev. 507.

by the courts, no definable legal principle is laid down for judicial guidance. Since 1886 the Supreme Court of Illinois has in a number of important cases declared laws unconstitutional as depriving of "due process of law" as to the substance of rights affected, yet the court has not sought to define "due process of law", and a standard of classification which it has accepted in one case it has rejected in another. Although the court has rejected a great number of statutes on the ground that they deprive of due process of law, it has not determined upon any standard to which it will adhere. With no rules for its guidance, the decision of the court in each particular case becomes the determination of a question of fact, and affords little if anything of a generalized legal principle. The Supreme Court of Illinois has so far been consistent neither with itself nor with any logical view in matters of classification under the "due process" clause. It has, as yet, afforded no guidance upon which the general assembly of Illinois may rely; no degree of care upon the part of the general assembly, even when accompanied by a knowledge of all the previous decisions of the court, is sufficient to determine in advance whether legislative action will be upheld or annulled when it comes before the court. A similar situation exists in practically every other State, and legislation upheld by one state court or the Supreme Court of the United States is in other States held unconstitutional as a deprivation of due process of law.[17] A similar indefiniteness appears in Switzerland in the enforcement against cantonal legislation of a guaranty that private property shall be inviolate.[18]

Professor Raymond Saleilles, in advocating the establishment

[17]No attention is here paid to the further complication in the United States which arises from the fact that both state and national constitutions have "due process" of law clauses, upon both of which a state court's decision is final, if it declares a state law unconstitutional. This situation leads to great difficulty, but the difficulty is not inherent in a system of judicial enforcement of constitutional guaranties. It should be suggested, however, that the action of the United States Supreme Court has caused little difficulty as compared with that of state courts.

This article was written before the enactment by Congress of Public Act 224 (approved Dec. 23, 1914) which permits the Supreme Court of the United States by certiorari to review state decisions holding state statutes invalid as violating the federal Constitution.

[18]*Entscheidungen des Schweizerischen Bundesgerichts,* Vol. 31 (1905) Part I, p. 645; Vol. 23 (1897) Part II, p. 1001; Vol. 37 (1911) Part I, p. 503. For similar development in Norway, see Morgenstierne, *Staatsrecht des Koenigreichs Norwegen,* 115-116. Excess condemnation, prevented in the United States and Argentina under the doctrine of "public purpose", is prevented in Switzerland on the ground that it violates the inviolability of property. *Entscheidungen* etc., Vol. 31 (1905) Part I, p. 645. See also *Fallos de la Suprema Corte* (Argentina) Vol. 33, (1888) p. 162.

of judicial control over legislation in France, said in 1902: "I have not lost all hope of having the objection of unconstitutionality apply in matters of individual right; but on the one condition that it be restricted to rights which may be not only affirmed in the constitution, but strictly defined in their existence, in their juridical contour, and in the conditions of their application."[19] Can such rights be strictly defined and made judicially enforcible? The protection of fundamental rights can hardly be reduced to a definite rule. When such a principle becomes capable of definite judicial or legal formulation it ceases to perform its intended purpose, for its purpose is to mark the line between private right and public interest, and this line is a constantly shifting one. Mr. Justice Holmes recently remarked that: "With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides."[20] But while the lines are being pricked out the pattern is changing. A rule once definitely formulated would in all likelihood be so broad as to require removal because unduly restrictive of legislative power or so narrow as to be innocuous. The judicial enforcement of constitutional guaranties almost necessarily implies broad undefined and undefinable limitations enforcible by the courts in the cases where they think proper, without the development of definite juridical standards. Such has been the experience of the past and is likely to be that of the future. The point of view of the courts in applying such guaranties changes, and has changed materially in this country within the past ten years, yet the guaranties themselves remain as indefinite as ever.

The problem of judicially enforcible constitutional guaranties is therefore a problem of judicial discretion in the interpretation of indefinite constitutional limitations. An effective theoretical argument can readily be made for judicial enforcement of constitutional limitations, for in modern governments the legislature is the body which acts positively in the development of new policies and is therefore most apt to transgress constitutional limitations, whereas the courts act negatively and do not ordinarily develop new policies.[21] Yet in enforcing broad limita-

[19] *Bulletin de la Société de Législation Comparée,* Vol. 31 (1901-2) 240-246.

[20] Noble State Bank *v.* Haskell (1911) 219 U. S. 104.

[21] It may be well to suggest that in Germany the movement for judicial control over legislation has largely related to the formal requisites of enactment, and was originally intended to protect the legislature by limiting the power of the monarch to promulgate as law measures which had not been approved by the legislative bodies.

tions according to their own discretion courts are positively determining policy, just so far as they succeed in preserving existing conditions and in checking new legislation. The policy is no less determined because it is determined by action which limits, rather than by action which constructs.

Judicial enforcement of broad constitutional guaranties must be tested, and must justify itself, as must every other political institution, not on theoretical grounds but by its actual results. And in an effort so to test it we should, so far as possible remove from our minds predispositions in favor of the system because it is one to which we have been accustomed. No one can satisfactorily discuss the value of an institution if he regards it as sacred. We must remember that most of our accepted judicial arguments and political theories have been developed to support already existing political institutions. Lest we give too much weight to such arguments and such theories, it should be borne in mind that, had the institutions been different, equally as satisfactory arguments and theories would have developed to support the different institutions.

In discussing the value of judicial enforcement of constitutional guaranties it should also be borne in mind that the courts of the United States in passing upon the validity of statutes have substantially discarded the doctrine,—laid down in earlier cases, and still repeated,—that the power to declare an act unconstitutional is a solemn and extraordinary function to be exercised (1) only in case of clear necessity, (2) as an incident to a *bona fide* controversy between parties, and (3) only in case the conflict between the statute and the constitution is clear beyond a reasonable doubt. The statement that the conflict must be clear beyond a reasonable doubt becomes meaningless when the constitutional provision applied does not itself state a defined principle, but is to be interpreted according to the discretion and opinion of the judge. In most important cases involving the constitutionality of statutes to-day the rights of the parties are incidental, and the important issue is the trial of the statute itself. A function cannot remain a solemn and extraordinary one when it is being performed every day. In the State of Illinois alone, seven hundred and eighty-nine cases since 1870 have involved constitutional questions, and one hundred and fifteen of these cases involved the "due process of law" clause; statutes were declared unconstitutional in two hundred and fifty-seven cases.

Assuming the situation to be what it is in the United States, let us discuss briefly some of the actual aspects of judicial enforcement of broad constitutional guaranties in this country. It has already been suggested that the courts have not developed and are not likely to develop, any definite legal standards to be applied in the enforcement of broad constitutional guaranties. This means, of course, an uncertainty as to the precise amount of constitutional protection. It may be well to repeat that constitutional guaranties as applied operate primarily to protect property rights. So far as purely individual rights are concerned, constitutional guaranties have proven largely ineffective.[22] Cases under immigration and white slave statutes illustrate this point. The constitution of West Virginia is most elaborate in its subordination of the military to the civil authority. Yet recent experiences show that constitutional safeguards were ineffective to protect individuals against military power. During our Civil War constitutional guaranties fell into abeyance, and the only real limitation upon governmental authority was that imposed by the necessity of keeping the support of the people. This situation was not altered by the fact that the United States Supreme Court, after the war had ended, boldly declared that, "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with its shield of protection all classes of men, at all times and under all circumstances." It may be urged that these statements relate to strenuous times, and that constitutional safeguards must not be judged by such conditions. Yet rights need protection only at a time when there is danger of their violation, and a safeguard which fails at such a time is not of great practical value. Writers on American constitutional law have often made fun of guaranties in some European constitutions which are in terms subject to suspension upon extraordinary occasions. We adopt the same practice but seek to conceal it from ourselves. Turning to guaranties operative in peaceful times, it must be admitted that to a large extent jury trial has, through the action and approval of the courts themselves, been encroached upon as a means of proceeding, at least in the field of public morals. Broad guaranties such as those of "due

[22]Where the right is sufficiently well established in fact, it exists and is respected without much reference to constitutional limitations. Such, for example, is the right to religious liberty. Where the right is not sufficiently well established in fact, constitutional guaranties do not prove effective.

process of law" and "equal protection of the laws," intended in large part to protect individual right, have been turned primarily into instruments for the protection of property.

But to what extent has the judicial application of constitutional guaranties protected property rights? Under "due process of law" the protection has been haphazard and irregular. Take, for example, the rule evolved from the "due process" clause that taxation may only be employed for a public purpose. The doctrine of public purpose was developed in such a manner as to prevent substantially none of the abuses of loans of public credit. Interference with property rights has to some extent been prevented under the "due process" clause in such matters as railroad rate regulation, but in other fields of public regulation of property there has been no assurance of real protection.[23] The courts, even under the broadest of constitutional guaranties, cannot destroy all legislation which they regard as unwise. They are very apt to sustain much unwise and burdensome legislation, which should never have been enacted. So, for example, legislation requiring an additional man upon each train crew is apt to be sustained, irrespective of facts that may make the enactment highly unwise. And so far as fundamental property rights are concerned it is probably true that when the matter becomes a politically important problem, the courts will be prepared to uphold laws which bring about a redistribution of property through the regulation of succession. Property in America uses judicial guaranties so far as possible, and gets what protection it can through them but does not rely upon them primarily for its protection.

Judicial enforcement of broad constitutional guaranties must be judged not in detail but by its results as a whole and it is true that a large mass of undesirable legislation has been defeated. Yet the value of the system must be determined by weighing its advantages against its disadvantages, and a large mass of useful legislation has been retarded or defeated, while at the same time judicial control has been ineffective as a means of checking vicious and unwise legislation. Take decisions for any one year or for any one State through a series of years, place on one side legislation which you may regard as unwise, and on the other what remains; there is no assurance that most of your cases of uncon-

[23] See, for example, the special burdens imposed upon railroads by the series of cases of which the latest is Missouri Pacific Ry. *v.* Omaha (Nov. 30, 1914) 35 Sup. Ct. Rep. 82.

stitutionality will deal with the first class. Some unwise and some wise legislation will be blocked, but the balance will not clearly be against the unwise.

Moreover, the system of judicial enforcement tends to overemphasize the question of constitutionality as against questions of wisdom and expediency, and reduces materially the responsibility which should rest upon legislature and people for the justice of legislation. The existence of the judicially enforcible guaranty weakens other safeguards, which in many cases would afford greater protection than the judicial one.[24] In addition the legislature has no standard to which it may adhere with safety, and cannot outline a consistent policy of legislation because it must constantly experiment in order to discover what the courts will sustain.

Much has been said recently about the fact that in passing upon constitutionality on the basis of broad guaranties courts are acting in a political or policy determining capacity, and this point of view has been exaggerated in Mr. Brooks Adams' *Theory of Social Revolutions*. Opposition to judicial control over legislation has existed only when the courts have run counter to the sober sentiment of the community. Where the courts have sought to solve important political questions by judicial decision they have clearly failed. Where, in other matters, the judicial attitude has not accorded with the sentiment of the community, the view of the community rather than that of the courts has in the long run prevailed. Yet when the opposition has occurred, the courts have lost something of popular respect and have been drawn into the political arena.

3. *Comparison of political and judicial guaranties.*

The United States has a system of political plus judicial guaranties as contrasted with a system of political guaranties existing in most of the other important countries. To what extent may the relative values of the two systems be determined on the ground (1) of a protection of individual and property rights, and (2) of a freedom upon the part of the government to meet new conditions? No basis of comparison exists because the question is not one as to whether protection of property and individual rights is more adequate in, say Great Britain, France or Germany, than it is in the United States. The protection of property and indi-

[24]Upon this whole matter, see Thayer, John Marshall, 102-110.

vidual rights may be, and probably is, more adequate in these countries. The question is rather, would these rights have been as well protected in the United States, in the absence of judicial guaranties? And in answer to this one can only resort to conjecture.

In Great Britain and in the countries of western Europe property rights and class distinctions are based upon traditions which run back for centuries. In this country the existence of judicial guaranties has led to a greater sense of security upon the part of property, and judicial power has doubtless been of value in a community such as ours where there were no traditional safeguards of property.

To what extent has legislative discretion in meeting new conditions been more restricted under judicial than under political guaranties? In this respect it may be said that in the long run the results under the two systems are not materially dissimilar. As already suggested, the sober sentiment of the community finally prevails in this country where it comes into conflict with judicial decisions. To some extent desirable legislation may be retarded and for a time destroyed, as was in part true of truck legislation in the United States, and our legislatures may be prevented by judicial interference from outlining a consistent program of reform. The movement for social and industrial legislation in the United States began later than in Europe and because of our social conditions it has not progressed as far, yet in reading such works as those of Dicey and Duguit[25] one is impressed with the fact that the development in the United States, so far as it has gone, has not been very different from that in England and France.

Our courts have in many matters prevented a consistent legislative policy, and have interfered with particular types of legislation, so that in the United States we have at almost every stage in the development of new policy been subject to material retardation; yet, although retarded and to some extent defeated in detail, the general legislative policy has won acceptance. To what extent the retardation in itself has been desirable it would be hard to say, yet it must be admitted that any gain in this respect has been in large part offset by the loss to the courts themselves in public esteem and confidence. The final success of legislative

[25]Dicey, Law and Public Opinion in England during the Nineteenth century. Leon Duguit, *Transformations Générales du Droit Privé depuis le Code Napoléon* (1912).

policies which have met with judicial opposition has come (1) either because the courts themselves have departed from the views which they first expressed, or (2) because judicial opposition has been overcome by constitutional change.

A very great change has taken place in the attitude of state courts during the past ten years, and they are now upholding legislation which a few years ago they would probably have declared unconstitutional. Except for one or two rather unfortunate lapses, the Supreme Court of the United States has taken a liberal attitude toward legislation aimed to meet new social and industrial conditions. A statement of Mr. Justice Holmes sums up what is becoming the attitude of the courts: "It may be said in a general way that the police power extends to all the great public needs. . . . It may be put forth in aid of what has been sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."[26]

When the court misinterprets the community need in holding a statute unconstitutional, the effect of such a decision is apt in time to be overcome by the court itself, either by a gradual shifting of attitude or, less frequently, by an express reversal of decision. Courts in changing their attitude do not move in a straight line, and their later views may not be logically consistent with their earlier ones. But "the life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[27]

But the change of attitude upon the part of a court usually takes some time, and it is often necessary to overcome promptly the effect of a decision based upon broad constitutional guaranties. So it becomes necessary for the people by constitutional change to authorize the policy of which the court has disapproved. When the Colorado Supreme Court held the fixing of an eight hour day for mines and smelters invalid as a deprivation of due process of law, the state constitution was so changed as expressly to provide for such legislation. And when the Court of Appeals of New York declared a compulsory workmen's compensation law

[26]Noble State Bank *v.* Haskell (1911) 219 U. S. 104.

[27]Holmes, The Common Law, 1.

a deprivation of property without due process of law, a state constitutional amendment was adopted expressly authorizing such legislation. Even the cumbersome machinery for the amendment of the national Constitution was brought into operation to overcome a decision of the United States Supreme Court denying, partly in the interest of property, the power of the national government to levy an income tax.

Under a system of judicial guaranties the lines between public interest and private right are redefined in part through the changing interpretations of the courts themselves. In case the interpretation of the court conflicts with the sentiment of the community the issue comes into the political field and sometimes threatens the independence of the court itself. Yet the danger here may easily be over-emphasized, and is indeed not very great if the judges be intelligent. When the courts mistake the sober view of the community as to the public interest, their decisions may be overcome by constitutional amendments in which the community view expresses itself. The judicial limitation is, then, a limitation of democracy, not a limitation against democracy, if the machinery of constitutional change is workable without great difficulty.[28] With the great difficulty of amending the national Constitution an unwise national court has power to impose permanent and burdensome limitations upon both state and national action, through its interpretation of broad constitutional guaranties. A somewhat similar statement applies to Illinois, whose constitution is very difficult to amend. Under conditions such as these, judicial guaranties approach the position of permanent limitations against democratic government. Only the wisdom of the Supreme Court of the United States has prevented the guaranties in the national Constitution from serving this purpose.

If constitutions be easily amendable, the judicial enforcement of broad constitutional guaranties is not objectionable, and has some useful features. The system of judicial guaranties has in many cases worked badly, and it is hardly as important in the

[28]As a matter of fact, there is a tendency in many States to weaken the distinction between forms of constitutional and statutory enactments, and in six States constitutional amendments may be proposed and adopted through the initiative and referendum in precisely the same manner as statutes. Under such conditions the importance of a state constitutional guaranty is likely to diminish. In some of the Swiss cantons the methods of constitutional and statutory enactment are substantially the same, yet the federal court enforces the guaranties in the cantonal constitution against cantonal legislation. *Entscheidungen des Schweizerischen Bundesgerichts,* Vol. 37 (1911) Part I, pp. 518-519.

protection of individual and property rights as is ordinarily assumed. Yet all human institutions work to some extent badly, and the fact that one system works badly does not mean that another should be adopted, for transplanted institutions seldom work as well as native ones. The system of judicial guaranties has become so much a part of our governmental organization that its abolition might lead to unforeseen and undesired results. The case may be one in which we should continue as an existing institution a form of organization which, were we starting anew, we would not establish. For this reason we cannot completely agree with the view expressed by the leading authority upon the constitution of the Netherlands: "We would act wisely by simply putting this question: To which power (in the state) can the final decision in regard to the true meaning of the provisions of the constitution be best entrusted? The answer to this question, it seems to me, need not everywhere be the same, for the peculiar character of the legislative and judicial power in different countries may easily have great influence on the decision. So far as our own state is concerned, I readily admit that the decision is a matter of indifference to me, and I would view with equal unconcern the testing right entrusted to or withheld from the judge."[29]

W. F. DODD.

UNIVERSITY OF ILLINOIS.

[29]Buys, De Grondwet, Art. 121, Clause 2.